AND
BRIEFS

No. 15-1293

IN THE

Supreme Court of the United States

MICHELLE K. LEE, UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND DIRECTOR, UNITED STATES PATENT AND TRADEMARK OFFICE,

Petitioner,

v.

SIMON SHIAO TAM,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF *AMICUS CURIAE* PRO-FOOTBALL, INC. IN SUPPORT OF RESPONDENT

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RULE 29.6 STATEMENT

Pro-Football, Inc. is wholly owned by WFI Group, Inc., which in turn is wholly owned by Washington Football, Inc. No corporation or publicly held company owns ten percent or more of Washington Football, Inc.'s stock.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Pro-Football, Inc. (the "Team") owns and operates the NFL's Washington Redskins. The Team owns six federal registrations for trademarks bearing the Redskins name or an iteration of the name. The Team adopted the Redskins name in 1933, and the PTO registered the Redskins marks on six separate occasions from 1967 to 1990.

The Team has a substantial interest in the question presented here: whether the disparagement clause in § 2(a) of the Lanham Act is facially invalid under the First Amendment. In this case, the PTO invoked § 2(a) to deny registration for a rock band's mark, THE SLANTS, that the PTO thought disparages Asian Americans. Separately, in 2014, the PTO invoked the same clause to cancel the Team's longstanding registrations. The PTO did so not because the marks are disparaging *today*, but because the PTO believed the marks disparaged Native Americans *decades ago*, when the PTO first registered the marks in 1967. The U.S. District Court for the Eastern District of Virginia affirmed the cancellations, rejecting the Team's arguments that § 2(a) violates the First Amendment, that § 2(a) is unconstitutionally vague, and that the government's nearly 50-year delay between the first registration and the cancellation violates procedural due process. *Pro-Football, Inc. v. Blackhorse*, 112 F.

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[1] No counsel for a party authored this brief in whole or in part. No one other than amicus curiae, its members, the National Football League, or amicus's counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties received notice at least ten days prior to the due date of amicus's intention to file this brief. The parties have consented to the filing of this brief, and copies of the letters of consent are on file with the Clerk's Office.

Supp. 3d 439 (E.D. Va. 2015). The Team appealed, and the appeal is fully briefed and awaiting oral argument in the Fourth Circuit. *Pro-Football, Inc. v. Blackhorse*, No. 15-1874.

Like this case, the Team's appeal presents the question whether § 2(a) is invalid under the First Amendment. The Team's appeal also presents two additional, intertwined constitutional challenges to § 2(a), as well as a narrowing construction that would avoid any constitutional question in both this and the Team's cases.

INTRODUCTION AND SUMMARY OF ARGUMENT

Five days after the government filed its petition for a writ of certiorari here, the Team filed a petition for a writ of certiorari before judgment in its pending Fourth Circuit case. *See* Pet. for Certiorari, *Pro-Football, Inc. v. Blackhorse*, No. 15-1311 (Apr. 25, 2016). The Team's petition explains that if this Court grants certiorari here, the Court also should grant certiorari before judgment in the Team's case as an indispensable and invaluable complement.

As the Team's petition states, however, the Team believes that *Tam* was correctly decided and does not warrant this Court's review. The en banc Federal Circuit applied settled First Amendment doctrine and rightly concluded that § 2(a)'s disparagement clause burdens speech on the basis of content and viewpoint, and fails both strict and intermediate scrutiny. This Court accordingly should deny the government's petition in this case.

But at a minimum, the Court should hear this case together with the Team's case. The Team's case presents the First Amendment question in the setting

of a cancellation, an essential context in which § 2(a) applies, and also presents two related constitutional questions and a narrowing construction of § 2(a) that would avoid all the constitutional questions. The Court can hear the two cases together by granting both the government's and the Team's petitions now. But if the Court does not wish to grant certiorari before judgment in the Team's case, the Court should hold the government's petition here until after the Fourth Circuit resolves the Team's appeal. There is no urgent need for this Court to hear this case now.

Alternatively, if the Court chooses to hear this case alone, the Court should direct the parties to address the additional questions of whether § 2(a) is unconstitutionally vague and whether § 2(a) applies only to identifiable individuals and juristic persons, not to groups as a whole. The Court regularly considers First Amendment and vagueness challenges together, and here the vagueness challenge to § 2(a) is at least as strong as the First Amendment challenge. In addition, the Court has an obligation to construe § 2(a), if possible, in a manner that avoids constitutional questions. The Court should not grant the petition in this case without directing the parties to address these critical issues.

ARGUMENT

I. THE COURT SHOULD DENY THE PETITION OR HOLD IT PENDING RESOLUTION OF THE TEAM'S FOURTH CIRCUIT APPEAL

A. *Tam* Was Correctly Decided And Does Not Warrant This Court's Review

The Federal Circuit in *Tam* correctly held that § 2(a)'s disparagement clause is facially invalid under

the First Amendment. That decision does not warrant this Court's review.

Section 2(a) reflects paradigmatic and rank viewpoint discrimination. "The PTO rejects marks under § 2(a) when it finds the marks refer to a group in a negative way, but it permits the registration of marks that refer to a group in a positive, non-disparaging manner." Pet. App. 21a. The PTO thus refused to register THE SLANTS because it disparages people of Asian descent, but repeatedly "registered marks that refer positively to people of Asian descent," including CELEBRASIAN and ASIAN EFFICIENCY. *Id.* The PTO similarly registered THINK ISLAM, but refused to register STOP THE ISLAMISATION OF AMERICA under § 2(a). *Id.* at 21a-22a. The government's petition only highlights the government's disdain for the viewpoint of the speech § 2(a) targets and penalizes. *See* Pet. 10, 16, 21 ("racial slurs"); 12 ("racial slur"); 15, 16, 22 ("racial epithets"); 16 ("racist, misogynist or bigoted"); 21 ("offensive"); 22 ("the most vile racial epithets").

The government argues that § 2(a) is viewpoint-neutral because it bars registration of marks found to be disparaging "without regard to the ideology, opinion, or perspective of the trademark owner." *Id.* at 13 (quotation marks omitted). That is non-responsive. Section 2(a) bars registration based on the "ideology, opinion, or perspective" that the mark purportedly *conveys* to the referenced group. Because § 2(a) targets the message expressed by the mark, it facially discriminates on the basis of viewpoint.

In any event, "[i]t is beyond dispute"—and the government does not contest—"that § 2(a) discriminates on the basis of content in the sense that it 'applies to particular speech because of the topic discussed.'" Pet. App. 18a-19a (quoting *Reed v. Town*

of Gilbert, 135 S. Ct. 2218, 2227 (2015)). And strict scrutiny applies to any content-based law that imposes "more than an incidental burden on protected expression." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). Non-incidental burdens include denials of otherwise available government benefits. *Id.* at 568-70 (discussing *Los Angeles Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32 (1999)).

The government defends § 2(a) on the theory that the PTO merely denied respondent the statutory benefits of registration while leaving him free to use the name THE SLANTS to perform his music. Pet. 12-14. But the Federal Circuit correctly rejected the government's argument that "§ 2(a) does not implicate the First Amendment because it does not prohibit any speech." Pet. App. 28a. "Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content." *Sorrell*, 564 U.S. at 566; Pet. App. 18a, 29a (quoting same). That is because "[t]he threat to the First Amendment arises from the imposition of financial burdens that may have the effect of influencing or suppressing speech, and whether those burdens take the form of taxes or some other form is unimportant." *Pitt News v. Pappert*, 379 F.3d 96, 111-12 (3d Cir. 2004) (Alito, J.). And "§ 2(a) burdens some speakers and benefits others." Pet. App. 30a. "Registration is significant"—it confers "important legal rights and benefits," including many "procedural and substantive legal advantages." *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1300 (2015) (quotation marks omitted). Section 2(a) thus deprives would-be registrants of substantial legal rights afforded to other speakers, including competitors.

The government is equally off-base in arguing that this Court should review § 2(a) under anything other than strict scrutiny, including the intermediate scrutiny afforded to commercial speech. The Slants and the Redskins use their names to engage in speech that is purely expressive: entertainment. Their trademarks thus stand on equal footing with those of THE LION KING, COMEDY CENTRAL, THE BEATLES, NEW YORK TIMES, NEW YORK CITY BALLET, and METROPOLITAN MUSEUM OF ART. None of these institutions could function without a name. Moreover, even mark-owners who manufacture widgets use their marks to engage in core political speech. Pet. 26-27 (No. 15-1311).

The government also argues that § 2(a) is constitutional under cases involving government subsidies or government speech. Pet. 14-22. While expressing uncertainty about the right "doctrinal 'box'" for its argument, the government asserts that "First Amendment scrutiny is significantly more relaxed when the government establishes eligibility criteria for a voluntary government program." *Id.* at 15. The government thus argues that "the First Amendment does not bar Congress from using the resources of the federal government to encourage some forms of expressive conduct rather than others." *Id.* at 18-19. Under the government's view, Congress could withhold registration with respect to any goods it disfavors (*e.g.*, guns, fast food); services that risk injury (*e.g.*, sports, skydiving); goods that appeal to prurient interests (*e.g.*, pornography, dating services); or marks that touch upon topics regardless of viewpoint (*e.g.*, abortion, political activities).

Government speech, however, is the only "doctrinal 'box'" that would allow content and viewpoint

discrimination. But the government fails to confront the sheer absurdity of rendering all two million currently registered trademarks government speech. *See infra* pp. 10-11. More importantly, the government names not a single registered mark that the public associates with the government as the speaker. And surely no one associates the government with registered marks like THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, REPUBLICAN NATIONAL COMMITTEE, MARIJUANA FOR SALE, and DOES THIS GUN MAKE MY BUTT LOOK BIG? *See also* Pet. App. 33a n.7, 43a. Registered marks like ACLU and NATIONAL RIFLE ASSOCIATION represent organizations that regularly oppose government regulation.

The government obliquely labels trademark registration a "voluntary government program" akin to a subsidy, Pet. 15, without naming a single analogous government program that engages in content and viewpoint discrimination. This case involves no cash, assistance, financial grants, or government employment. To the contrary, the PTO is funded by applicants' registration fees. *See* Pet. App. 57a.

The PTO engages in quintessentially regulatory activity when it reviews applications to determine if a mark is distinctive and not misleading. The fact that the registration process ends with a piece of government paper no more "relax[es]" (Pet. 15) the First Amendment "than when the government issues permits for street parades, copyright registration certificates, or, for that matter, grants medical, hunting, fishing, or drivers licenses, or records property titles, birth certificates, or articles of incorporation." Pet. App. 47a; *cf. Cleveland v. United States*, 531 U.S. 12, 20-22 (2000) (system of issuing patents is purely "regulatory").

In short, because the trademark registration scheme is regulatory and indistinguishable from the patent, copyright, and other registration schemes, this case is easy: no "doctrinal 'box'" permits Congress to condition trademark registration on a mark owner's refusal to change a name that the government finds odious.

B. The Team's Case Is A Better Vehicle

At a minimum, the Court should not grant review in this case without also granting review in the Team's case. As explained in the Team's pending petition, the Team's case is an essential complement to this case because it involves the cancellation context (as opposed to the application context of *Tam*). Pet. 13-16 (No. 15-1311). Section 2(a) applies in only two contexts: initial application for registration and cancellation of registration. *Tam* and the Team's case together thus round out the two scenarios in which § 2(a) applies. It therefore makes sense jurisprudentially to consider the cases together. And it makes no sense to consider § 2(a) only in the context of the initial refusal to register THE SLANTS when the First Amendment analysis is much bleaker for the government in the cancellation context, both in terms of the harms to speech and chilling effect, and the government's lack of any apparent interest in disassociation from marks that may no longer offend the referenced group. *Id.* at 14-15. In addition, the Team's case presents related constitutional questions as well as a narrowing construction of § 2(a). *Id.* at 16-25. The Court should have these issues before it when considering the First Amendment challenge to § 2(a).

The Court could consider the cases together through two possible avenues. First, if the Court grants certiorari in this case now, the Court should grant certiorari before judgment in the Team's case.

Alternatively, the Court should hold the government's petition in this case until after the Fourth Circuit resolves the Team's appeal. The Team will seek this Court's review if the Fourth Circuit affirms the district court's decision, and the government presumably will do the same if the Team prevails in the Fourth Circuit. The Court then could hear this case and the Team's case together.

C. There Is No Urgent Need To Grant The Petition Here Before The Fourth Circuit Rules

1. The government urges this Court not to wait for the Fourth Circuit's decision, reasoning that because the Team's case "involves other statutory and evidentiary challenges to the agency's decision, the court of appeals may decide the case without reaching the constitutional question." Pet. 23 n.8. The government has it backwards.

Three of the Team's "other" arguments are arguments that this Court should consider together with the First Amendment question raised by the government's petition. In addition to the Team's First Amendment challenge in the Fourth Circuit, the Team argues that § 2(a) is impermissibly vague, that the government's delay in cancelling the Team's decades-old registrations violates due process, and that § 2(a) does not apply to disparagement of groups such as Native (or Asian) Americans. The possibility that the Fourth Circuit might resolve the Team's appeal on one of these three grounds supports waiting for the Fourth Circuit to rule—not granting review in this case to decide the First Amendment issue alone.

To be sure, the Team also argues that the evidence did not support summary judgment against the Team

on the question whether the term Redskins was disparaging when registered, and that laches barred the petition to cancel the Team's registrations. But the possibility that the Fourth Circuit might rule in the Team's favor on one of these two grounds does not warrant hearing this case alone now. If the Court holds the government's petition in this case, the Court could simply grant that petition alone after the Fourth Circuit's decision.

2. The government argues that this Court's review is needed because preventing registration of offensive, racist, misogynistic, bigoted, immoral, or scandalous "terms and imagery" is a "longstanding and important part of the federal trademark-registration system." Pet. 16, 21-23. That argument is hard to accept at face value. The countless offensive marks that the PTO has already registered—many within the last twelve months—suggests that the government's interest is, at best, vastly overstated.

Just by way of example, the PTO refused to register THE SLANTS because the PTO found the term disparaging to Asian Americans in the context of an all-Asian American rock band. But the PTO has already registered WHITE TRASH COWBOYS and OFF-WHITE TRASH for two all-white rock bands, and registered N.W.A.—an acronym that includes a racial slur against African Americans—for an all-African American rap group. And since rejecting THE SLANTS, the PTO registered REFORMED WHORES for an all-woman country western comedy band. Unless the PTO thought that the descriptors whores, white trash, and N.W.A. flatter the referenced groups, the government is not rigorously enforcing § 2(a) to protect women, Caucasians, and African Americans. Yet the PTO did not hesitate to register these marks.

The examples do not end with musical groups. The PTO has registered DANGEROUS NEGRO, BAKED BY A NEGRO, CELEBRETARDS, RETARDIPEDIA, YELLOWMAN, RED MAN, STINKY GRINGO, GRINGO STYLE SALSA, GRINGO BBQ, YID DISH, LITTLE INDIAN GIVER, MIDGET-MAN, CRIPPLED OLD BIKER BASTARDS, OL GEEZER, WHITE GIRL WITH A BOOTY, OH! MY NAPPY HAIR, NAPPY ROOTS, BOYS ARE STUPID THROW ROCKS AT THEM, WHITE TRASH REBEL, DAGO SWAGG, REDNECK ARMY, CRACKA AZZ SKATEBOARDS, and DUMB BLONDE (twice), with no apparent regard to whether such marks may disparage women, men, racial groups, religious groups, elderly people, and disabled people. The government's concern for offensiveness likewise is not apparent from the PTO's routine registration of pornographers' marks and other lewd, graphic, and sexually explicit marks and images, including many with overt racial references and vulgar female nudity. *See, e.g.*, Team CA4 Br. 4, 24 & n.4; Team CA4 Reply 10 & n.1.

Equally dubious is the government's representation that § 2(a)'s disparagement clause "has guided the PTO's decisions for 70 years." Pet. 8. "There were few marks rejected under the disparagement provision following enactment of the Lanham Act." Pet. App. 7a. Indeed, in the fifty years following passage of the clause, we know of only four reported cases. Pet. 22 (citing Pet. App. 7a-8a). Moreover, the registered logos for AUNT JEMIMA, UNCLE BEN'S, and CREAM OF WHEAT are some of the oldest but most controversial trademarks in American history touching on race. The government registered these marks without regard to whether they may have disparaged African Americans, even though the marks were associated with slavery from their inception. *See, e.g.*, M. Kern-Foxworth, *Aunt Jemima, Uncle Ben, and Rastus:*

Blacks in Advertising, Yesterday, Today, and Tomorrow (1994).

In the Fourth Circuit, the government argues that its failure to enforce § 2(a) against such marks does not render the statute invalid. U.S. CA4 Br. 41. But the government's haphazard and seemingly incoherent enforcement vividly illustrates § 2(a)'s vagueness. And under the First Amendment, "[t]he agency's practice" cannot be "squarely at odds with the governmental interests asserted." *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 191 (1999). The "inconsistencies" that permeate the Principal Register decisively undermine the notion that the government has an interest (much less a weighty one) in preventing registration of disparaging, immoral, or scandalous marks. *Id.* at 190.

In any event, the government's record of enforcing § 2(a) only sporadically—and even then wildly inconsistently (*infra* pp. 13-14)—shows that there is no urgent need for this Court to hear this case now. Again, the above marks are only a small sample. And as far as we are aware, the government has taken no steps to cancel any of the registrations discussed above and has no plans to do so. Indeed, the government sat idly by for decades with the REDSKINS registration. The government's utter passivity refutes any notion that the government's interest in keeping its "Principal Register" clean is either "longstanding" or "important." Pet. 22. The Court should not credit that unfounded assertion by the government. The government will suffer no harm if the Court holds its petition pending the Fourth Circuit's resolution of the Team's appeal.

II. ALTERNATIVELY, THE COURT SHOULD DIRECT THE PARTIES TO ADDRESS WHETHER § 2(a) IS IMPERMISSIBLY VAGUE AND WHETHER § 2(a) APPLIES TO GROUPS

If the Court chooses to hear this case now without also hearing the Team's case, the Court should direct the parties here to address the additional questions of whether § 2(a) is impermissibly vague and whether § 2(a) applies only to identifiable persons, not to groups as a whole.

A. This Court Should Direct The Parties To Brief Whether § 2(a) Is Impermissibly Vague

As set forth in the Team's petition, this Court should not consider the First Amendment question in this case without the interrelated question of whether § 2(a)'s disparagement clause is unconstitutionally vague. Pet. 16-20 (No. 15-1311).

This Court routinely considers First Amendment and vagueness challenges together. *See id.* at 16 (citing *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2320 (2012); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 8 (2010)). And here, the vagueness challenge to § 2(a) is at least as strong as the First Amendment challenge. The term "disparage" and the test the PTO applies to determine disparagement are hopelessly subjective, leading the PTO often to treat identical terms differently. Pet. 17-18 (No. 15-1311). The Team's petition listed six startling examples. *Id.* at 18.

But more exist. Just days after the government filed this petition, the PTO offered to register STOP ISLAMIZATION OF AMERICA and has since published the mark in the PTO's Official Gazette, even though

the PTO in 2010 refused to register STOP THE ISLAMISATION OF AMERICA because the PTO deemed the mark disparaging to Muslims under § 2(a). *See* PTO, Official Gazette Publication Confirmation, U.S. Serial No. 86857969, http://goo.gl/RlJNCB. It is hard to fathom how the PTO could have missed the blatant inconsistency. The earlier denial was challenged and became the subject of a decision by the Federal Circuit in *In re Geller*, 751 F.3d 1355 (Fed. Cir. 2014), a decision cited repeatedly in this very case. Pet. App. 7a, 8a, 9a, 21a, 25a, 33a n.6.

And there is even more. The PTO deems THE SLANTS disparaging to Asian Americans, Pet. App. 163a, and THE REDSKINS disparaging to Native Americans, Pet. App. 93a (No. 15-1311). But the PTO has registered YELLOWMAN and RED MAN, even though these marks unquestionably refer to Asian Americans and Native Americans. *See* http://www.yellowman.com/c/ABOUT/About+YellowMan.html; http://www.swedishmatch.com/en/Media/Articles/Red-Man--the-flagship-of-chewing-tobacco. And the PTO has offered comical explanations for why it concluded that BLACK TAIL does not disparage African-American women in the context of an adult entertainment magazine, *Boswell v. Mavety Media Grp. Ltd.*, 1999 WL 1040108, at *8-9 (T.T.A.B. 1999), that JAP does not disparage Japanese Americans, *In re Condas S.A.*, 1975 WL 20869, at *1 (T.T.A.B. 1975), and that MOONIES does not disparage members of The Unification Church, *In re Over Our Heads Inc.*, 1990 WL 354546, at *1 (T.T.A.B. 1990).

Furthermore, anyone who claims to be disparaged or offended by a mark can object to the PTO's registration of the mark or can seek cancellation of the registration at any time in the future, including

decades after the fact, as occurred with the Team's 1967 registration. 15 U.S.C. § 1064; PTO, *Trademark Trial and Appeal Board Manual of Procedure* § 309.03(b) (June 2015). Delegating enforcement discretion to the whim of 300 million citizens renders § 2(a) even more arbitrary, unpredictable, and discriminatory. As the government has told this Court, "to arm millions of private citizens with such potent relief . . . unacceptably chills speech." Brief for United States at 25, *Nike, Inc. v. Kasky*, No. 02-575 (U.S. Feb. 28, 2003).

The Court may well want to resolve § 2(a)'s constitutionality on the basis of vagueness rather than the First Amendment. If the parties brief only the First Amendment question, however, the Court would not have the benefit of briefing by the parties and interested *amici* on the vagueness question. And even were the Court to uphold § 2(a) under the First Amendment, a court of appeals likely would strike it down as impermissibly vague. The en banc Federal Circuit strongly suggested that § 2(a) is impermissibly vague, Pet. App. 32a-34a & nn.6-8, and two judges would have so held, *id.* at 68 (O'Malley, J., concurring, joined by Wallach, J.). It would be wasteful for this Court to consider the First Amendment and vagueness questions seriatim. If the Court grants the petition here alone, the Court should direct the parties to brief whether § 2(a)'s disparagement clause is unconstitutionally vague.

B. The Court Should Direct The Parties To Brief Whether § 2(a) Applies Only To Identifiable Persons And Not To Groups

In the Fourth Circuit, the Team vigorously advances a narrowing construction of § 2(a) that would avoid any constitutional question. Read naturally, § 2(a)'s

prohibition on disparagement of "persons, living or dead," 15 U.S.C. § 1052(a), refers only to identifiable individuals or juristic persons—not groups as a whole, like racial and ethnic groups. Indeed, the necessary implication of the government's contrary view is that § 2(a) prevents disparagement of all groups, including not only billionaires and politicians but also racists and misogynists.

The Court should not decide a constitutional issue "if there is some other ground upon which to dispose of the case." *Bond v. United States*, 134 S. Ct. 2077, 2087 (2014) (quotation marks omitted). Courts must adopt interpretations avoiding constitutional doubt absent a "clear and unambiguous" contrary interpretation. *I.N.S. v. St. Cyr*, 533 U.S. 289, 305 (2001). Stated differently, this Court will narrowly construe a statute to avoid a constitutional issue as long as the interpretation is "fairly possible." *Almendarez-Torres v. United States*, 523 U.S. 224, 237 (1998). For the reasons stated in the Team's petition, the Team's reading of § 2(a) is the most natural, and at a minimum it is "fairly possible." Pet. 24-25 (No. 15-1311).

In this case, neither the parties nor the Federal Circuit addressed this narrowing construction, and the government's petition does not mention it. But the doctrine of constitutional avoidance counsels that this Court should decide whether § 2(a) applies to groups as a whole, regardless of whether it was raised below. *See Rosenberg v. Fleuti*, 374 U.S. 449, 451 (1963); *Neese v. S. Ry. Co.*, 350 U.S. 77, 78, (1955). This Court accordingly should not consider respondent's First Amendment challenge to § 2(a) without directing the parties to brief this narrowing construction.

The third question presented in the Team's petition—whether the government's decades-long delay between

registering a trademark and cancelling the registration under § 2(a)'s disparagement clause violates due process—is equally worthy of this Court's attention. For the reasons explained in the Team's petition, the answer to that question has important implications for the First Amendment analysis. Pet. 21-24 (No. 15-1311). But that question is not presented in this case, and, accordingly, it would not be possible to direct the parties to brief it here. That is yet another reason why this case is an inferior vehicle for considering the constitutionality of § 2(a).

CONCLUSION

Unless the Court grants the Team's petition for a writ of certiorari before judgment, the government's petition in this case should be denied or held pending the Fourth Circuit's resolution of the Team's appeal. Alternatively, if the Court grants the government's petition alone, the Court should direct the parties to address the additional questions of whether § 2(a) is unconstitutionally vague and whether § 2(a) applies only to identifiable persons and not to groups.

Respectfully submitted,

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